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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 467 MISC.

4278 HAZEL BUILDING CORPORATION,
a corporation, et al.,
Petitioners,

vs.

ALBERT BEREST, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Opinion Below.

This matter comes up on the District Court's denial of an interlocutory motion to dismiss for lack of jurisdiction and for misjoinder of parties. (Tr. 25). The Trial Court rendered no formal opinion, reported or otherwise.

Jurisdiction.

The order of the District Court sought to be reviewed was entered on November 1, 1949. (Tr. 25). The petition for a writ of certiorari was filed in this Court on April 10, 1950. Petitioners seek to invoke the jurisdiction of this Court under Section 1651 of the Judiciary Act of 1948 (28 U.S.C.A. § 1651). Sections 1254 and 2101 of said Act, also relied upon by petitioners, are not involved herein.

Question Involved.

The question involved herein is whether this Court should issue a writ of certiorari directly to the District Court to review its denial of an interlocutory motion to dismiss by which it:

a. Determined that the parties were properly joined in this action; and

b. Construed section 205 of the Housing and Rent Act of 1947, (61 Stat. 193, 50 U.S.C. App. Supp. § 1881.) as permitting the bringing of tenants' damage suits for rent overcharges in the district court, regardless of the amount involved.

Statement of the Case.

The statement of the case made by petitioners is correct with the following modifications. This was an action for treble damages under Section 205 of the Housing and Rent Act of 1947 (61 Stat. 193; 50 U.S.C., App. Supp. § 1881) brought by 23 plaintiffs residing in one building. The Answer of the petitioners did not deny that the overcharges alleged in the complaint occurred if the premises were subject to the provisions of that Act. They alleged, however, that the building in which all of the plaintiffs resided was exempted under the provisions of that Act because it was a building commonly known as a hotel in the community, giving customary hotel services. (Tr. 19). The issues of fact and law, therefore, with respect to each of the plaintiffs, were identical and arose out of the same series of transactions. The Trial Court so ruled in the memorandum opinion referred to by petitioners. (Pet. 8).

Petitioners refer to another suit in which they, as defendants, raised the same motion to dismiss as herein, which was similarly denied. *Henderson et al.* v. *Belmar Building Corp. et al.*, D.C.N.D. Ill. No. 49 C 358. That

motion was denied on April 26, 1949. The conflict between the Seventh and Third Circuits has existed for a year. Yet, Petitioners did not seek certiorari from this Court alleging the necessity of emergency consideration of this issue until April 12, 1950.

ARGUMENT.

The power of this Court to issue a writ of certiorari to a district court to review the denial of a motion to dismiss is not disputed. The sole question here is whether this case is a proper one for the exercise of that power. Respondents contend that it is not, for that extraordinary remedy has always been limited to extraordinary and emergency situations. Petitioners seek this writ solely for personal convenience in order to have piecemeal review of certain legal propositions without the burden of trial on the merits. If petitioners are correct, all rulings by district courts on interlocutory motions, where a contrary ruling would have avoided the necessity of a trial on the merits, would justify direct review by this Court.

I.

The propriety of the joinder of parties is not a proper subject for the extraordinary use of the writ of certiorari.

It is obvious that petitioners seek certiorari solely to avoid the personal inconvenience of the trial of this suit. They ask this Court to determine by the use of this extraordinary remedy whether the Trial Court in its discretion correctly permitted the joinder of parties. Respondents do not intend to consider fully at this time the merits of the question of joinder. Suffice it to say that the petitioners refer to no appellate cases in support of their position. Further, they refer to no cases under the Housing and Rent Act of 1947, (Pub. Law 129, 80th Cong., 1st Sess.), which preclude the joinder of plaintiffs,[1] particu-

[1] Petitioners cite **Fox et al** v. **34 Hillside Realty Co.**, 79 F. Supp. 832 (S.D. N.Y. 1948) and cases referred to therein in support of their proposition that joinder is not permissible under the Housing and Rent Act of 1947. These cases

larly in such a case as this where the petitioners themselves acknowledge that there are questions of fact and law common to all of the parties, arising out of the same series of transactions. They admit that the case involves the single issue of whether or not the building in which all plaintiffs reside was commonly known as a hotel and therefore decontrolled under the Rent Act. (Pet. 8), a question identical as to law and fact to all parties. The Court of Appeals for the Seventh Circuit has held that joinder of plaintiffs in damage suits under that Act is properly within the trial court's discretion. *Meyercheck* v. *Givens,* 180 F. (2d) 221 (C.A. 7, 1950).

Without further consideration of the propriety of the Trial Court's ruling on this question, it is clear that the refusal to dismiss this case for alleged improper joinder of parties does not warrant the extraordinary issuance of the writ of certiorari directly to the District Court. That Court's determination was clearly the exercise of a proper judicial function. It was in no sense an abuse of judicial discretion or the exercise of power beyond its jurisdiction—the situation to which the use of extraordinary writs is generally limited. *Roche* v. *Evaporated Milk Ass'n.,* 319 U. S. 21 (1943) and cases cited therein; *I.C.C.* v. *U. S.,* 289 U. S. 385, 393 (1933); *Ex Parte Peru,* 318 U. S. 578, (1943) and cases cited therein; *United States Alkali Export Ass'n.* v. *United States,* 325 U. S. 196, (1945); and *De Beers Consol. Mines* v. *United States,* 325 U. S. 212, (1945).

The decision of the Trial Court on this point may be questioned by petitioners upon appeal to the Court of

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(1 continued)
had nothing whatsoever to do with the propriety of joinder in one action under that Act, but are concerned only with whether the claims of the individual participants were cumulative in a suit for injunctive relief under the Housing and Rent Act of 1947, a point which is discussed subsequently in this brief.

Appeals. In no way has the District Court interfered with this right. *Roche* v. *Evaporated Milk Ass'n.*, 319 U. S. 21 (1943); *Ex Parte United States*, 287 U. S. 241 (1932); *Whitney* v. *Dick*, 202 U. S. 132, (1906). Nor do petitioners suffer any irreparable damage because of this ruling, as in *De Beers Consol. Mines* v. *United States*, 325 U. S. 212 (1945). True, petitioners must try the case on the merits before obtaining appellate review of the denial of their motion. This, however, has never been the basis for the issuance of a writ of certiorari. *Roche* v. *Evaporated Milk Ass'n.*, 319 U. S. 21, 30-1 (1943). Nor is any matter of public importance involved, as required in *Ex Parte Peru*, 318 U. S. 578 (1943), and *United States Alkali Export Ass'n.* v. *United States*, 325 U. S. 196, (1945). The issuance of the writ under these circumstances to directly review an interlocutory ruling would subject to this extraordinary remedy every refusal by a trial court to dispose of a case without trial on the merits.

II.

THE CONSTRUCTION OF SECTION 205 OF THE HOUSING AND RENT ACT OF 1947 BY THE DISTRICT COURT, RESULTING IN DENIAL OF THE MOTION TO DISMISS, DOES NOT JUSTIFY THE ISSUANCE OF A WRIT OF CERTIORARI TO THE DISTRICT COURT.

Petitioners moved to dismiss this case on the ground that none of the individual claimants asserted damages of $3,000.00. The Trial Court construed Section 205 of the Housing and Rent Act of 1947 as permitting such actions to be brought in the District Court without regard to the amount of damages sought, following *Adler et al.* v. *Northern Hotel Co.*, 175 F. 2d 619 (C.A. 7, 1949). Petitioners contend the denial of their motion to dismiss justifies the issuance of a writ of certiorari by this Court to the District Court because of a conflict between the

Seventh and Third Circuits (*Fields* v. *Washington*, 173 F. 2d 701 (C.A. 3, 1949)) on this point. Respondents contend that this is not a proper case for the use of an extraordinary writ for the following reasons:

1. The Trial Court's denial of the motion to dismiss may be brought before the Court of Appeals either under the ordinary appellate procedure or by request for the issuance of a writ of certiorari by that Court;

2. The construction of Section 205 of the Housing and Rent Act of 1947 and the denial of petitioners' motion was the exercise of a proper judicial function of the District Court and not the exercise of a power clearly beyond its jurisdiction—the situation to which this extraordinary remedy is generally limited;

3. There is no irreparable injury to the parties herein, such as is found in the cases cited by petitioners. Rather, there is only the "inconvenience" to the petitioners of trial on the merits, which has long been held not to be the basis for the extraordinary issuance of the writ of certiorari; and

4. This case does not involve a question of public importance analogous to those limited instances in which this Court has exercised the power to issue this writ extraordinarily.

We shall discuss each of these reasons as briefly as possible.

The Trial Court's Action May Be Reviewed By The Court of Appeals.

The District Court's denial of petitioners' motion to dismiss, by reason of its construction of Section 205 of the Housing and Rent Act of 1947, is a matter which may be brought before the Court of Appeals either under the usual appellate procedure or by request for certiorari under Section 1651 of the Judicial Code (28 U. S. C. A.

Section 1651). In nearly all cases in which this Court has issued writs of certiorari under Section 262 of the prior Judicial Code, the writ has issued to a Court of Appeals after a determination by that Court. Grants of certiorari by this Court did not involve, as it would in the present case, the use of the writ to review an interlocutory ruling of a trial court in circumvention of the appellate procedure established by Congress, unless the District Court's action in some way precluded access to the Court of Appeals.

As stated by this Court in *Roche* v. *Evaporated Milk Ass'n.*, 319 U. S. 21, 26 (1943), in determining whether the writ should issue:

> "Considerations of importance to our answer here are * * * that no act or omission on its [the District Court] part has thwarted or tends to thwart appellate review of the ruling."

Both cases relied upon by petitioner support this conclusion. In *United States Alkali Export Association* v. *United States,* 325 U. S .196, 202 (1945), the Court stated:

> "In the usual case this Court will decline to issue a writ prior to review in the Circuit Court of Appeals whether by ordinary appeal (citing cases) or by an extraordinary remedy. (citing cases) But where, as here, sole appellate jurisdiction lies in this Court, application for a common-law writ in aid of appellate jurisdiction must be to this court."

In *De Beers Consol. Mines* v. *United States,* 325 U. S. 212 (1945), it was emphasized that the action involved an equity suit brought by the Attorney General under the Sherman Anti-Trust Law where the Supreme Court had exclusive appellate jurisdiction.

There is no justification in this case for circumventing the Court of Appeals. Merely because that Court may have passed upon this question in other litigation does not permit petitioners' to assume that recourse to it will therefore be futile. In no case has this constituted the

basis for issuance of a writ of certiorari directly to a district court. More than this, petitioners have stated that this very question is now before the Court of Appeals for the Seventh Circuit in another of their cases where, after denial by the trial court of the motion to dismiss, judgment was entered against them and an appeal was taken (Pet. 3.)

This issue therefore may be considered promptly by that Court in the regular course of appeal. It would be a dangerous precedent to permit direct review by this Court of determinations of a trial court, before or after judgment, merely because the Court of Appeals for that Circuit may have passed upon the question in other litigation. Even under extraordinary circumstances which might warrant the issuance of the writ of certiorari, circumvention of the Court of Appeals has caused sharp dissent by members of this Court. *Ex Parte Peru,* 318 U.S. 578 (1943).

The Trial Court's Denial of the Motion to Dismiss Was Not an "Extra-Judicial" Act.

This Court has consistently held that it will not issue extraordinary writs as a substitute for appeal where the trial court has determined questions which it was competent to decide and which are reviewable in the regular course of appeal. This is true even where the determination of the trial court is on a question of jurisdiction. *Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21, 26-27 (1943) and *United States Alkali Export Assn.* v. *United States,* 325 U. S. 196 (1945). The ruling on petitioners' motion to dismiss involved solely a question of statutory construction. Certainly, the construction of a federal statute is a proper judicial function of a district court. This case is not analogous to *De Beers Consol. Mines* v. *United States,* 325 U. S. 212, 217, 220 (1945), where the Trial

Court had issued an injunction dealing "with a matter lying wholly outside the issue in the suit" and "beyond the power conferred upon the Court." Even there, however, four Justices dissented saying that (p. 225): "By that test, every interlocutory order which is wrong can be reviewed here * * * and the decision if followed will open the floodgates to review of interlocutory decrees." It cannot be contended that it was not within the province of the Trial Court to construe the federal statute involved. This case in no way involves a grasp of power beyond the jurisdiction of the Trial Court.

Petitioners Suffer No Irreparable Injury As A Result of the Denial of Their Motion to Dismiss.

In *De Beers Consol. Mines* v. *United States,* 325 U. S. 212 (1945), the Court issued the writ because the temporary injunction involved was not appealable and the litigant would have suffered irreparable injury by having his assets completely tied up during the course of trial and regular appeal. Even there, four Justices dissented, saying that "hardship or inconvenience alone was not sufficient to justify resort to the extraordinary course of review by way of Section 262." No such unusual circumstance, however, is involved here. Petitioners claim that they should not be required to incur the expense of trial if they are correct in their contention that the Court lacked jurisdiction. Were this the basis for the extraordinary remedy sought, direct review could be had in every instance where a trial court has denied a motion to dismiss on any question where a contrary ruling would have terminated the litigation. Regular appellate procedure, if petitioners are correct, would become meaningless in those cases.

In *Whitney* v. *Dick,* 202 U. S. 132 (1906), this Court in reversing the Court of Appeals which had issued a

writ of certiorari for alleged lack of jurisdiction, stated that the reasons given by the Court of Appeals were similar to those frequently prompting writs of *habeas corpus*, namely: "to put an end to the litigation by some short summary process" rather than to proceed "in orderly way" by writ of error. This Court added that it had "repeatedly held against this procedure." Even if it were true—which it is not—that the litigation here would be long, involved and expensive, the inconvenience to the litigants of trial in advance of an appellate determination on the question of jurisdiction does not warrant the issuance of a writ of certiorari. As stated in *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 30-31 (1943):

> "We may assume, as they allege, that that trial may be of several months duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable * * * Here the inconvenience to the litigants results alone from the circumstance that Congress has provided for review of the district court's order only on review of the final judgment, and not from an abuse of judicial power or refusal to exercise it which it is the function of mandamus to correct."

No Question of Grave Public Importance Requiring Extraordinary Issuance of the Writ of Certiorari Is Raised.

Petitioners also contend that the conflict between the Seventh and Third Circuits as to the construction of Section 205 of the Housing and Rent Act of 1947 warrants the issuance by this Court of a writ of certiorari directly to the District Court. It is clear that the issuance of extraordinary writs is limited to extraordinary circumstances and is not to be applied to a case which "raises no question of grave public importance." Douglas, J., dissenting in *De Beers Consol. Mines* v. *United States*, 325 U. S. 212 (1945).

In its most recent expressions concerning the issuance of extraordinary writs, this Court in denying such writs has said:

> "These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies they are reserved for really extraordinary cases." *Ex Parte Fahey,* 332 U. S. 258, 260 (1947), and *Ex Parte Collett,* 337 U. S. 55, 72 (1949).

In the former case the trial court had directed payment of $50,000.00 in fees and costs pending appeal. Nevertheless, the Court refused to issue the writ, saying:

> "We hold that the applicants' grievance is one to be pursued by appeal at the proper time and to the proper court rather than by resort to our original jurisdiction for extraordinary writs."

See also *Ex Parte Mars, Inc.,* 320 U. S. 710 (1943) and *Adams* v. *United States,* 317 U. S. 269, 274 (1943). The limited use of these writs was demonstrated by this Court in these words:

> "It is significant that, since 1925, less than ten of the numerous applications to this Court for such writs have been granted." *Ex Parte Peru,* 318 U. S. 578, fn. 585 (1943).

It might be added that even in those instances where extraordinary circumstances or grave public importance required the issuance of the writ, it was a rare case in which there was not a vigorous dissent. Truly, the issuance of a writ of certiorari in advance of the regular appellate procedure, like all extraordinary writs, has been used only in extraordinary situations, for example: where the right of the litigant to appeal either to the Court of Appeals or to this Court from a state court has been

denied or precluded[2]; to review the issuance of the extraordinary writ of certiorari by a Court of Appeals;[3] where there has been a persistent disregard of the rules of civil procedure; where the Court refuses to perform a plain ministerial duty; where the case involves comity between state and federal courts; and where the petitioner has been deprived of his right of jury trial.[4] Similarly in cases of grave public importance, as in *Ex Parte Peru,* 318 U. S. 578 (1943), where the retention of a vessel belonging to the Republic of Peru, pending appeal from the District Court's denial of a claim of sovereign immunity, would "interfere with the proper conduct of our foreign relations" and cause a conflict between the Court and the Department of State which had certified the vessel as being immune. Even then there was a strong dissent. It has also been used where the denial of a preliminary motion by a district court would impair, retard or completely terminate the action of an administrative agency pending completion of the appeal (*United States Alkali Export Assn.* v. *United States,* 325 U. S. 196 (1945)), and where a temporary order would cause irreparable injury pending the completion of appeal (*De Beers Consol. Mines* v. *United States,* 325 U. S. 212 (1945)).

That few opinions are found denying certiorari on questions of public importance is explained by the Court in *Ex Parte Peru,* 318 U. S. 578, fn. 585 (1943), where it was stated:

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[2] For example, see **Holiday** v. **Johnston,** 313 U. S. 342 (1941); **In Re: Chetwood,** 165 U. S. 443 (1897).

[3] **Whitney** v. **Dick,** 202 U. S. 132 (1906) reversing the Court of Appeals which had granted this extraordinary writ.

[4] The summary of cases indicating the limitation of the extraordinary writ to extraordinary circumstances is set out in **Roche** v. **Evaporated Milk Ass'n.,** 319 U. S. 21, 31-2 (1943).

> "Only in rare instances has their denial been the occasion for an opinion dealing with questions of public importance."

The issuance of the writ is the rare exception, for as stated in *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26 (1943):

> "The traditional use of the writ in aid of appellate jurisdiction both at common law and in federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."

It is well established that the extraordinary writ will not be used as a substitute for appeal and that "there must be circumstances imperatively demanding a departure from the ordinary remedy by writ of error or appeal." *Whitney* v. *Dick*, 202 U. S. 132, 140, (1906).

How then does the instant case fit these concepts limiting the exercise of this extraordinary power? The construction of the statute by the District Court was the exercise of a proper judicial function and its conduct did not preclude recourse to the Court of Appeals. Review of the denial of the motion to dismiss is within the purview of the appellate court's jurisdiction. No justification exists for by-passing that court. The only "hardship" to the petitioners is the necessity of trying the case on its merits prior to appellate review of the denial of their motion.

Nor does the conflict between the Seventh and Third Circuits warrant the issuance of the writ to the District Court. Although conflict may, in this Court's discretion, be the basis for the issuance of a writ of certiorari to a court of appeals in the normal appellate process, we have been unable to find any case where conflict has been the basis for the extraordinary issuance of the writ directly to a district court or to a court of appeals prior to a determination by it.

There is even less reason to circumvent the ordinary appeal procedures by the issuance of the writ in this case since these very petitioners have the question of statutory construction pending before the Court of Appeals for the Seventh Circuit and a determination is presently available in the course of the regular appeal procedures (Pet. 3).

It is not denied that a conflict exists between the Seventh and Third Circuits as to the construction of Section 205 of the Housing and Rent Act of 1947 with respect to the requirement of $3,000.00 in controversy. This conflict, however, does not create the confusion extravagantly pictured by petitioners. There have been no decisions other than *Fields* v. *Washington,* 173 F. 2d 701 (C.A. 3, 1949), and *Adler et al* v. *Northern Hotel Co.,* 175 F. 2d 619 (C.A. 7, 1949), which have been decided by the Court of Appeals on the question.[5] During the period of more than one year since the conflict arose, petitioners cite only one decision by a district court in another circuit involving the same question, and we know of only one other. *Albright* v. *Wilson,* 87 F. Supp. 737, (D.C. Minn., 1949). Even before the conflict arose, there apparently were only three decisions by the district courts on this question.[6] Obvi-

[5] Petitioners assume and therefore state that the district courts of the 5th Circuit are compelled to dismiss damage suits under the Housing and Rent Act of 1947 because of **Steinfeldt** v. **Haymond,** 175 F. 2d 768 (C.A. 5, 1949), which petitioners allege is in accord with **Fields** v. **Washington** (Pet. 3, 12). The **Steinfeldt** case, decided prior to **Adler** v. **Northern Hotel Co.,** 175 F. 2d 619 (1949), did not involve this question, but concerned a treble damage suit under the Emergency Price Control Act of 1942 (56 Stat. 23, U.S.C. App., §§ 901-46, et seq.) which, all courts agree, granted jurisdiction without regard to amount. No tenant damages cases are cited which rely upon the **Steinfeldt** case as plaintiff would suggest.

[6] **Sampson** v. **Thomas,** 76 F. Supp. 691; **Adams** v. **Backlund,** 81 F. Supp. 643; **McCrae** v. **Johnson,** 84 F. Supp. 220. **United States** v. **Resch,** 79 F. Supp. 832 does not involve a private treble damage suit. Petitioners also cite **Fox** v. **34 Hillside Realty Corp.,** 79 F. Supp. 832 (S.D. N.Y. 1948); **Luftman** v.

ously, the effect of the conflict has not been such as to require the extraordinary intercession of this Court. Moreover, it cannot be disputed that in the year that this conflict has existed, many cases involving this question have been disposed of, and petitioners do not argue that in the year which has elapsed, the problem has become more acute by a flood of new cases. On the contrary, it will hardly be denied that the number of cases involving this question has been reduced during the year and in all probability will even be more greatly reduced and perhaps entirely eliminated. The question therefore arises: since no case other than petitioners', referred to in their petition, has reached a Court of Appeals subsequent to the conflict, why does this question suddenly require the need of the immediate and extraordinary relief which petitioners seek? More than this, petitioners' argument for the necessity of the quick resolution of the conflict is belied by the fact that they, themselves, have waited more than five months before taking any action to obtain a decision. Furthermore, in the case of *Henderson* v. *Belmar Building Corporation,* (N. D. Ill. No. 49 C 358), in which petitioners state that they are parties (Pet. 3), the file of the District Court shows that more than one year has passed since the

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(6 continued)
Ross, 75 F. Supp. 627 (S.D. N.Y., 1948); and **Spieler** v. **Haas,** 79 F. Supp. 835 (S.D. N.Y. 1948) as holding that the jurisdictional amount is indispensible (Pet. 13). These cases do not in any way involve damage suits under Section 205 of the Housing and Rent Act of 1947 or the question of jurisdiction involved herein. Rather, they were suits for injunction by tenants where no section of that Act gave jurisdiction. There has never been a conflict under this Act or its predecessor, the Emergency Price Control Act of 1942, as to the rule that this remedy was not available to tenants. **Hock** v. **250 Northern Ave. Corp.,** 142 F. 2d 435 (C.A. 2, 1944). Thus, none of these cases involved the proposition for which petitioners cite them, although by **dictum** each case stated that had they been damage suits by tenants under Section 205 of the 1947 Act, there would have been jurisdiction, regardless of the damages sought.

denial of petitioners' identical motion to dismiss, and no steps have been taken by them to seek review of that order. It is clear that petitioners selected the instant case in which to request this extraordinary relief rather than the *Henderson* case in order to conceal the staleness of their present request for emergency action.

Conflict cannot be the basis for the extraordinary exercise of the power to issue the writ even though the conflict relates to a question which might have disposed of the litigation without a trial. Under the Housing and Rent Act of 1947 and its predecessor statute, the Emergency Price Control Act of 1942, numerous conflicts arose between circuits even as to questions which would otherwise have disposed of the litigation of numerous lawsuits without trial.[7] The same is true under a myriad of federal statutes. Obviously, this Court would not exercise its extraordinary power to issue the writ directly to the district courts in all of those cases.

As heretofore stated, although conflict may be the reason, in the discretion of this Court, for the issuance of a writ of certiorari to a Court of Appeals after its final determination, it does not follow that conflict justifies emer-

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[7] For example, conflict arose after the termination of the Office of Price Administration as to whether the United States could be substituted for the Administrator as plaintiff in the many pending suits filed by that Agency, although the time for substitution had expired. The Eighth and Tenth Circuits so held. **Fleming** v. **Goodwin,** 165 F. 2d 334 (C.A. 8, 1948); **Northwestern Lumber and Shingle Co.** v. **United States,** 170 F. 2d 692 (C.A. 10, 1948). The Seventh Circuit held to the contrary. **Bowles** v. **Wilkie,** 175 F. 2d 35 (C.A. 7, 1949). Notwithstanding this conflict and notwithstanding the fact that courts in one circuit were dismissing such suits and in the other requiring that they be tried, this Court denied certiorari in the **Wilkie** case, 338 U. S. 861 (1950). In fact, prior to the conflict, this Court denied certiorari in the Eighth Circuit case although the ruling of that Court meant that if incorrect, many cases were being unnecessarily tried on the merits. **Goodwin** v. **United States,** 334 U. S. 828 (1948).

gency consideration by this Court by issuance of a writ of certiorari to the district court or to the Court of Appeals prior to determination by it. This is particularly true here where the conflict has existed for more than one year, the number of cases in which the question involved is diminishing, and the question is now presently pending before the Court of Appeals of the Seventh Circuit in accordance with the regular appellate procedure.

Petitioners argue that coupled with the conflict is the fact that trial could be avoided in the district courts in a number of cases if the trial court was wrong in denying the motion to dismiss. This, however, is true in every case where either plaintiff or defendant makes a motion which could dispose of the case without trial and the trial court overrules the motion. The number of such instances which arise in district courts either in individual cases or in instances where the court's ruling might dispose of a number of other cases, is countless. And the fact that the motion in the instant case involves the construction of a statute to determine whether the court has jurisdiction to hear damage suits regardless of the amount in controversy, is of no significance because the necessity of trying the case is equally avoided in all of the other instances. To accept petitioners' reasoning would "open the floodgates to a review of interlocutory decrees" and "circumvent the policy of Congress to restrict review of these cases to final judgment." Douglas, J., dissenting in *De Beers Consol. Mines* v. *U. S.*, 325 U. S. 212, 220 (1943).

CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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